Office - Supreme Court, U.S
FILED
APR 13 1984
ALEXANDER L. STEVAS
CLERK

No. 83-850

In the Supreme Court of the United States

OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES CONNORS KARO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Cases: Page

Adams v. *Williams*, 407 U.S. 143 12
Arkansas v. *Sanders*, 442 U.S. 753 3
Franks v. *Delaware*, 438 U.S. 154 17
Hester v. *United States*, 265 U.S. 57 7
Illinois v. *Andreas*, No. 81-1843 (July 5, 1983) 3
Katz v. *United States*, 389 U.S. 347 7
Rakas v. *Illinois*, 439 U.S. 128 5
Michigan v. *Thomas*, 458 U.S. 259 14
Oyler v. *Boles*, 368 U.S. 448 15
South Dakota v. *Opperman*, 428 U.S. 364 12
Terry v. *Ohio*, 392 U.S. 1 ..... 11, 12
United States v. *Broward*, 594 F.2d 345, cert. denied, 442 U.S. 941 ..... 18, 19
United States v. *Chadwick*, 433 U.S. 1 2
United States v. *Cortina*, 630 F.2d 1207 18
United States v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984) 2-3, 6, 7, 8
United States v. *Knotts*, No. 81-1802 (Mar. 2, 1983) 5, 7, 8, 9, 14, 15
United States v. *Miller*, 425 U.S. 435 16
United States v. *Payner*, 447 U.S. 727 ..... 17, 18
United States v. *Place*, No. 81-1617 (June 20, 1983) 6, 7
United States v. *Salvucci*, 448 U.S. 83 4
Zurcher v. *Stanford Daily*, 436 U.S. 547 16

Constitution and statutes:

U.S. Const.:
Amend. I 15
Amend. IV ..... *passim*
Amend. V 15
Amend. XIV 15

Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 *et seq.* 16
Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, Tit. XI, 92 Stat. 3697 *et seq.* 16

Miscellaneous:

H.R. Rep. 95-1383, 95th Cong., 2d Sess. (1978) 16
S. Rep. 96-874, 96th Cong., 2d Sess. (1980) 16

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-850

UNITED STATES OF AMERICA, PETITIONER

v.

JAMES CONNORS KARO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In support of their contention that the warrantless installation and monitoring of a beeper violates the Fourth Amendment, respondents invoke general Fourth Amendment principles governing searches of homes and containers, but they do not adequately explain why these principles should apply to the use of the beeper in this case. It is true that the beeper was physically present inside a container when the container was transferred to respondents, and that the container was situated inside at least one residence and two storage lockers on occasions when the beeper's signals were monitored by law enforcement agents. However, this factual recitation merely poses, and does not answer, the legal questions presented here. It is not enough for respondents to assert that the monitoring of a beeper while it is inside a home "is exactly the same" as a search of the home by a police officer (Karo Br. 3), or that such monitoring, if not subject to antecedent judicial control, "would

completely invade the privacy of our citizens" (Harley Br. 26).[1] We suggest that few disinterested persons would join respondents in the assertion that the physical entry of government officials into their home involves no greater invasion of privacy than the monitoring of a beeper signal emanating therefrom. In any event, respondents' ipse dixits are no substitute for legal analysis.

As we have shown in our opening brief, proper consideration of the Fourth Amendment implications of beeper use cannot proceed without first focusing on the precise nature of the information conveyed by a beeper and then determining the extent, if any, to which the beeper's disclosure of that information infringes protected privacy interests. It is our position that the limited information disclosed by the beeper in this case, concerning the movement and location of the can of ether, was not in any meaningful sense information as to which respondents could have harbored a legitimate expectation of privacy. Alternatively, we submit that any intrusion upon protected privacy interests was so minimal that use of the beeper may be upheld in the absence of a warrant and probable cause. Respondents' briefs are largely unresponsive to our principal contentions.

1. Respondents argue (Karo Br. 30-32; Harley Br. 12-13, 29) that the can of ether was a closed container in which respondents Karo, Horton, and Harley (all of whom apparently contributed to the purchase of the ether) had legitimate expectations of privacy, and that therefore the presence of the beeper in the can at the time it was transferred to respondents constituted a "search" of the can, analogous to the search of the luggage in *United States* v. *Chadwick*, 433 U.S. 1 (1977). As this Court recently explained, however, "[a] 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed" (*United*

[1] If these characterizations accurately described the substance of what transpired, we would of course readily concede that a warrant supported by probable cause was necessary.

States v. *Jacobsen*, No. 82-1167 (Apr. 2, 1984), slip op. 3 (footnote omitted)). Assuming for present purposes that the agents would have had to obtain a warrant before they could open the can and examine its contents (but cf. *Illinois* v. *Andreas*, No. 81-1843 (July 5, 1983); *Arkansas* v. *Sanders*, 442 U.S. 753, 764-765 n.13 (1979)), it does not at all follow that the beeper's mere presence in the can, without more, was a search of the can. It is only with respect to the contents of the can that the can's owners could claim any protected privacy interest. Even when monitored, however, the beeper revealed no information about the contents of the can. Thus, respondents cannot claim that the beeper's mere presence in the can amounted to a "search."[2]

Respondents rely on the court of appeals' statement (Pet. App. 7a) that "[a]ll individuals have a legitimate expectation of privacy that objects coming into their rightful ownership do not have electronic devices attached to them, devices that would give law enforcement agents the opportunity to monitor" the location and movement of the objects. This analysis is flawed for several reasons. First, it assumes that there is a legitimate expectation of privacy in the location and movement of a container to which a beeper has been attached; but this is the very question that must be addressed in determining whether the *monitoring* of a beeper is a Fourth Amendment search. Second, unless it is monitored, a beeper discloses no information at all. Accordingly, it is obvious that the intrusion, if any, into legiti-

---

[2] Respondents do not argue, nor could they, that the beeper's mere presence constituted a "seizure" of the can. "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property" (*United States* v. *Jacobsen*, slip op. 3 (footnote omitted)). The beeper's presence did not interfere in any way with respondents' possessory interests in the can. Until the can was actually seized during the search of the Taos residence, respondents were free to do—and in fact did—what they liked with the can and its contents.

mate privacy interests occurs when the beeper is monitored to disclose the location of the container in which it has been installed. There is simply no basis in the Fourth Amendment for concluding that an unmonitored beeper effects a "search." While philosophers may debate whether a tree falling in a remote, uninhabited forest produces a sound, such metaphysical musings are far removed from the practical considerations that must be addressed in deciding questions of Fourth Amendment law. In short, the fact that the beeper's presence inside the container provides the agents with an "opportunity" to monitor the container's location does not, by itself, transform that presence into a "search."

Respondents erroneously contend (Karo Br. 33) that the court of appeals' ruling on the installation issue "was *dictum*, or, at most, an alternative rationale" for affirming the suppression order as to Karo. On the contrary, the alleged violation of Karo's rights resulting from the installation of the beeper was the only ground articulated by the court below in support of its ruling that Karo could seek suppression of the evidence seized in the course of the warrant-authorized search of the Taos residence (Pet. App. 13a-14a). Although it is true that the beeper assisted the agents in ascertaining that Karo had transported the cans of ether from informant Muehlenweg's residence to his home, Karo established no legitimate expectation of privacy in any of the other locations to which the ether was traced as a result of the beeper monitoring,[3] and the agents' ability to monitor the beeper at those other locations was not at all dependent on their monitoring of the beeper while it was at Karo's house.

---

[3] Ownership of the can clearly did not confer upon Karo a legitimate expectation of privacy in each of the places to which the can was taken in the course of the beeper surveillance. See *United States* v. *Salvucci*, 448 U.S. 83, 91-93 (1980).

Moreover, there is no merit to respondents' additional contention (Karo Br. 33-34) that the monitoring of the beeper at Karo's house violated Karo's legitimate privacy expectations. Respondents' effort to distinguish this case from *United States* v. *Knotts*, No. 81-1802 (Mar. 2, 1983), because here the beeper may have been monitored while it was inside Karo's residence, is unavailing. As we have pointed out in our opening brief (at 24-27), the limited information conveyed by a beeper—that it has arrived at or is present in the vicinity of a particular location—is precisely the same (and has the same value for law enforcement purposes) regardless whether the beeper is broadcasting its signals from inside or outside a particular structure. Although the agents in this case did not actually see Karo transfer the cans of ether from the car to his house, Karo—who had the burden of establishing that his Fourth Amendment rights were violated by the challenged law enforcement activity (*Rakas* v. *Illinois*, 439 U.S. 128, 131 n.1 (1978))—presented no evidence that he in fact brought the cans into his house and that the transfer of the cans was not visible from the adjacent public areas. His case, like that of the other respondents (who also failed to present such evidence), is therefore analytically indistinguishable from that of the defendant in *Knotts*. There, the agents did not actually observe the arrival on the defendant's property of an automobile carrying the beeper-laden can of chemicals; the Court nevertheless held that because the fact of the car's arrival could have been ascertained by visual surveillance from public places adjoining the defendant's property, the use of the beeper to obtain that information did not violate the defendant's legitimate expectations of privacy.[4]

[4] Moreover, the agents' having lawfully learned that the can arrived at Karo's house, and having subsequently ascertained without "searching" any private area of Karo's that it had moved to other locations, there is no way in which any of the suppressed evidence could possibly be said to be a fruit of any monitoring that was undertaken while the container remained on Karo's property.

2. Respondents argue (Karo Br. 8, 11; Harley Br. 15-18) that even though the monitoring of a beeper provides only limited information, it nevertheless constitutes a "search" for Fourth Amendment purposes whenever the beeper happens fortuitously to be physically situated within a house at the time its signals are monitored. First, they assert that any investigative procedure that reveals even a limited amount of information about the contents of an area in which a person has a legitimate expectation of privacy is necessarily a search. Second, they assert that any investigative procedure that results in the disclosure of information and that is accompanied by a physical intrusion into a private area is subject to the Fourth Amendment. These assertions are incorrect as a matter of law and are also largely irrelevant to the investigative procedure at issue here.

Respondents' first assertion, that the minimally intrusive nature of a beeper is irrelevant in determining whether its use is subject to regulation under the Fourth Amendment, is contrary to this Court's recent decisions in *United States* v. *Place*, No. 81-1617 (June 20, 1983), and *United States* v. *Jacobsen*, *supra*. The holding in *Place*, that a sniff of luggage by a narcotics detection dog is not a search, rested on the recognition that this investigative procedure is "limited both in the manner in which the information is obtained and in the content of the information revealed" (slip op. 11). The Court pointed out (*id.* at 10-11):

> A "canine sniff" by a well-trained narcotics detection dog * * * does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item.

> Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.

Relying on *Place*, the Court in *United States* v. *Jacobsen*, slip op. 12-14, held that a field test conducted by a law enforcement agent that revealed that a suspicious powder contained cocaine did not constitute a "search" within the meaning of the Fourth Amendment. Because the test could reveal only "whether a substance is cocaine, and no other arguably 'private' fact," the Court concluded that its use did not compromise any legitimate privacy interest (*Jacobsen*, slip op. 13).

Respondents' second assertion, that the reach of the Fourth Amendment turns not on the information disclosed by a particular investigative procedure but on notions of physical trespass, is precisely the kind of analysis that was abandoned by this Court in *Katz* v. *United States*, 389 U.S. 347, 353 (1967). See also *Hester* v. *United States*, 265 U.S. 57 (1924); *United States* v. *Knotts*, slip op. 4, 9. Most recently, in *Jacobsen*, the Court expressly rejected the argument that the dog sniff in *Place* could be distinguished from a field test of a suspicious substance on the ground that a dog sniff involves no physical invasion of an individual's effects. Instead, the Court explained that the reason the investigative procedure in *Place* did not intrude upon any legitimate privacy interest was that the procedure revealed only a limited piece of information (*i.e.*, the presence or absence of contraband in a closed suitcase). *Jacobsen*, slip op. 14 n.24.[5]

---

[5] Respondents' efforts (Karo Br. 21-22; Harley Br. 22) to distinguish this case from *Place* are to no avail. The disclosure of the public movements of a can in which a beeper has been installed

Beyond this, as we pointed out in our opening brief, agents monitoring a beeper are often unable to determine whether the beeper is located inside a particular house, rather than on a porch or in an adjacent yard. Thus, even where the beeper may in fact be broadcasting from inside a residence, it often will not disclose that information to the authorities.[6] Moreover, to agents attempting

---

and of the arrival of the can at a particular location is no more a search than the disclosure that a closed piece of luggage contains contraband. As noted above, this Court has refused to distinguish the dog sniff from other investigative procedures on the ground that it involves no physical penetration of a person's effects. See *Jacobsen*, slip op. 14 n.24. The fact that the luggage is usually located in a public place when it is detained and subjected to a dog sniff does not diminish the owner's traditional expectation of privacy in the contents of his luggage. While the detention of luggage for an extended period of time might render the seizure of the luggage unreasonable, the intrusion, if any, into legitimate privacy interests that is associated with beeper surveillance (like that associated with visual surveillance) does not increase as a function of the duration of the surveillance. In addition, the period of surveillance is determined largely by the actions of the suspects themselves: where, as in *Knotts*, the suspects transport the beeper-laden object directly to the site of the laboratory, the period of surveillance will be brief; where, as here, the suspects transport the object to a variety of different locations over a period of more than four months in order to avoid detection, the period of surveillance will be more lengthy.

[6] The beepers utilized by the Drug Enforcement Administration broadcast their signals on VHF frequencies assigned by the National Telecommunications and Information Administration, an agency within the Department of Commerce. A beeper operates on one watt of power (as compared to five watts for a walkie-talkie); its signal is therefore not very powerful. Under normal operating conditions, a beeper's signal can be monitored from two to four miles away on an open road and from 20 miles away from the air. Because obstructions will interfere with the reception of VHF signals, beepers have a very short range (about two blocks) in congested urban areas.

The monitoring of a beeper is quite different from the monitoring of a transponder, which is used to track the location of airplanes. A transponder (which the Federal Aviation Administration requires for aircraft of a certain size) will emit a signal only in response to a signal sent from a radar station. The transponder's

to track the movement of precursor chemicals, the information conveyed by a beeper has essentially the same utility whether the beeper is broadcasting from inside or outside a particular structure: for purposes of following the chemicals to the next location, or of obtaining a warrant to search the place where the chemicals are presently situated, the precise location of the chemicals is of little or no moment. Finally, and most importantly, as this Court held in *Knotts*, the information conveyed by a beeper is not information as to which an individual can reasonably be said to harbor a legitimate expectation of privacy, because the movements of a vehicle over public roads and the arrival of a container at a particular location are subject to disclosure through visual surveillance. The beeper in this case did not disclose what was done with the ether inside any of the places to which it was traced: it revealed nothing about any movement of the ether inside any of the premises, or about whether the ether was being used for any purpose.[7]

---

signal enables the radar equipment to determine the plane's location by calculating the time it takes for the transponder to respond to the initial signal. A beeper, on the other hand, sends out continuous signals. Agents monitor the beeper's signals from two different points and, by using principles of triangulation, they can determine the beeper's approximate location. When monitoring from a distance, the agents cannot pinpoint the beeper's location; the location can be determined more precisely the closer the agents get to the signal. On a sidewalk, within 25 to 50 feet of a residence, agents may be able to ascertain whether a beeper is broadcasting from the front or back of a house, or from the right or left side of the structure. In order to avoid detection, however, agents monitor the signals from a position where they are out of sight of the suspects. Thus, as was the case here (see our opening brief at 25 n.9), the agents often do not get close enough to determine whether a beeper is inside or outside of particular premises.

[7] Contrary to respondents' contention (Harley Br. 19), the beeper did not disclose that the ether was located in locker 15 at the second storage facility. Rather, the beeper revealed only that the ether was in one of the lockers. The agents first suspected that the ether was in locker 15 when they detected the odor of ether

In short, there is no merit to respondents' heavy-handed efforts to analogize the use of the beeper in this case to a traditional "search" of the numerous locations to which the beeper led the agents in the course of their investigation. The only searches that actually occurred (at the first storage locker and at the Taos residence) were undertaken pursuant to search warrants. Because the beeper revealed information only about the public movements of the can of ether, and because it did so in a way that avoided the invasion of privacy entailed in a traditional search (in which highly personal items or activities may be exposed to official eyes), the monitoring of the beeper was not a "search" within the meaning of the Fourth Amendment.

3. If the use of the beeper in this case is deemed a "search" of private premises, then, according to respondents (Karo Br. 11-28; Harley Br. 19-23), it must be treated like any other such search—viz., it must be supported by a warrant issued on probable cause. But there

---

emanating from that locker. Their suspicions were confirmed when they learned that that locker had been rented by two individuals driving a red and white pickup truck on the same day that Horton had removed the cans of ether from the first storage facility and had loaded them into a similarly described truck. J.A. 55-56. Thus, respondents' claim that visual surveillance alone would have proven ineffective in locating the ether ignores the fact that the agents have other investigative techniques at their disposal, including their sense of smell and the ability to question witnesses.

Similarly, respondents' reference (Karo Br. 6) to the fact that the beeper disclosed that the ether was inside the Taos residence is of little, if any, relevance. The agents visually followed Horton's truck to that residence (J.A. 57); they knew from a confidential informant that a residence in Taos contained a laboratory in which Horton and his associates were engaged in extracting cocaine from clothing (J.A. 59-60); and they observed the windows and doors of the residence wide open on a cold, windy day, strongly suggesting that the ether was being utilized inside the residence (J.A. 58, 60-61). Thus, the beeper merely supplemented the information that was available to the agents from other sources and enabled the agents to maintain surveillance while avoiding detection.

is nothing in the Fourth Amendment that requires the reasonableness of all searches to be judged under identical standards, without regard to the degree of intrusion into legitimate privacy interests.

Of course, the Fourth Amendment ordinarily requires that a neutral magistrate must determine that there is probable cause to believe that evidence of criminal activity may be found at a particular residence or other private premises before law enforcement officers may enter and conduct a search. One reason why the warrant requirement is strictly enforced in this situation is because it is inevitable that, in the course of searching private areas for specified items, the police will be exposed to a wide range of lawful private activity. Thus, the warrant requirement assures that significant breaches of the privacy of the home or other private areas will occur only when approved by a neutral judicial officer. In the case of a beeper, however, the information conveyed is so limited that any intrusion into legitimate privacy interests is qualitatively as well as quantitatively different from the intrusions accompanying traditional searches that must be authorized by a warrant. Thus, even if the activity is technically classified as a search, it is reasonable to permit the police to monitor a beeper's signals on the basis of a degree of suspicion falling short of probable cause, and without obtaining a warrant. It bears emphasis, however, that where beeper surveillance provides agents with probable cause to believe that evidence of crime is located at particular private premises, they may not enter and search those premises until after they have obtained a traditional search warrant.

a. Respondents contend (Karo Br. 19; Harley Br. 21) that the principles of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and its progeny are inapplicable here because the *Terry* line of cases involved exigent situations in which it would have been impractical to obtain a warrant. Respondents entirely miss the point of *Terry* and of our reliance on it.

In *Terry* and subsequent cases, the Court held that certain law enforcement actions, although they are searches or seizures regulated by the Fourth Amendment, need not be supported by probable cause but may instead be justified on the basis of reasonable suspicion that criminal activity is afoot. In other words, where a given technique is minimally intrusive with respect to individual privacy interests while at the same time valuable in advancing significant societal interests, it is reasonable to permit use of the technique without requiring the existence of probable cause. As the Court stated in *Adams* v. *Williams*, 407 U.S. 143, 145 (1972):

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes that it may be the essence of good police work to adopt an intermediate response.

Although it is true that the Court in *Terry* observed that the particular police activity at issue was not subject to the warrant procedure (392 U.S. at 20), once the Court determined that the activity was one that may be reasonable without probable cause, it followed that no warrant *could* be required for such conduct, since "[a] warrant may issue only upon 'probable cause.'" *South Dakota* v. *Opperman*, 428 U.S. 364, 383 (1976) (Powell, J., concurring).

In considering whether the *Terry* model is an apt one to apply to beeper surveillance, the issue thus has to do not with the procedural aspects of the Fourth Amendment embodied in the warrant requirement, but with the substantive standard by which use of the technique is to be governed. Ordinary visual surveillance of suspects by agents who do not enter private premises is not regulated at all by the Fourth Amendment. If beeper surveillance, which essentially provides equivalent information with greater safety and efficiency, is to be regulated,

it seems to us more than adequate protection of the privacy interests at stake to restrict such surveillance to cases in which reasonable suspicion of criminal activity exists. By requiring the higher standard of probable cause (and only in that case would any question of a warrant requirement arise), we submit that the Court would be unreasonably restricting the use of this valuable technique in a significant class of cases in which there exists a substantial suspicion of illicit activity, and in which use of the beeper would be more valuable and perhaps less intrusive in dispelling or substantiating the suspicion than other available investigative means.[8]

b. Respondents have no effective response to our argument that imposition of a warrant requirement in the beeper context would not serve the policies underlying the Fourth Amendment's Warrant Clause in any meaningful way.[9] Respondents argue (Karo Br. 25-26; Harley

[8] For example, one type of case in which a beeper is used during the early phases of an investigation is where the DEA receives information from a chemical distribution company of suspicious orders of large quantities of precursor chemicals useful in manufacturing illicit controlled substances. Standing alone, such information might not amount to probable cause sufficient to support a warrant, yet it might well call for the institution of surveillance to determine whether the chemicals are to be put to illegal use. Installation of a beeper may be the only practical and effective means for conducting such surveillance, yet it would be unlawful for DEA to employ it if probable cause is established as the substantive standard for beeper use. We do not believe such a rule would be reasonable.

[9] Respondents wholly misapprehend our argument on this point. We do not contend that it is always or even usually infeasible for the authorities to obtain a beeper warrant if probable cause exists (although, in the early stages of an investigation, when visual surveillance and use of beepers are likely to be most productive, probable cause may be absent). Instead, we contend that the magnitude of the intrusion on protected privacy interests is an important consideration in determining whether the Fourth Amendment imposes a probable cause or warrant requirement before law

Br. 23) that a beeper warrant can particularize the container in which the beeper is to be installed and can recite that ascertainment of the unknown places to which the beeper will be taken are the things to be "seized" by the beeper surveillance (information that is neither persons, houses, papers, nor effects). It seems to us that this boilerplate exercise—which calls for the procurement of a warrant rather closely resembling the hated writs of assistance—would trivialize, rather than advance, the interests served by the Fourth Amendment.[10]

4. Respondents argue (Karo Br. 18, 29; Harley Br. 24-28) that, without the restrictions imposed by a warrant requirement, government agents would be free to undertake continuous surveillance of any citizen, without the knowledge and supervision of the judiciary. This argument is virtually identical to one the Court expressly rejected in *Knotts* (slip op. 7-8):

> [T]he fact is that the "reality hardly suggests abuse," *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 566 (1978); if such dragnet type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable. *Ibid.* Insofar as respondent's complaint appears to be simply that scientific devices such as the beeper enabled the police to be more effective in detecting crime, it simply has no constitutional foundation. We have never equated police efficiency with unconstitutionality, and we decline to do so now.

Contrary to respondents' contention (Karo Br. 29), the beeper monitoring in this case did not "continuously

---

enforcement officers may undertake a particular investigative procedure.

[10] We note that it does not follow even from a substantive standard of probable cause that a warrant is necessary. Respondents overlook this Court's automobile search cases, which uphold warrantless searches in the absence of exigent circumstances because of the individual's reduced expectations of privacy in an automobile. See, *e.g.*, *Michigan* v. *Thomas*, 458 U.S. 259 (1982).

invade[] the private activities of six defendants, an undetermined number of uninvolved people, four houses and two storage lockers for five months." In fact, the only "activities" the beeper disclosed were the public movements of the cans of ether, as respondents and their confederates transported them from place to place over a period of several months in an effort to avoid detection by the authorities. Although the period of beeper surveillance in this case was much longer than that in *Knotts*, the monitoring here was no more intrusive on privacy interests than that in *Knotts*. If respondents are correct in asserting that the applicability of the warrant requirement turns on the duration of beeper surveillance, then drug dealers like respondents will have a ready formula for ensuring that the fruits of any beeper surveillance of their public movements would be subject to challenge on grounds that have no relation to the minimal nature of the intrusion or non-private nature of the information acquired.

Here, as in *Knotts*, respondents' argument at bottom reflects the view that our governmental institutions are incapable of controlling abuses of police activities if virtually all facets of those activities are not held to be subject to prior judicial scrutiny under the Fourth Amendment. The exceedingly pessimistic vision that respondents conjure up is in fact far removed from the realities of contemporary American society. Thus, today at least, the concerns raised by respondents seem theoretical and speculative. But even granting their legitimacy it does not follow that the Fourth Amendment is the only available mechanism to safeguard against such abuses. Should beepers (or policemen on foot) be employed to follow the movements of persons because of their unpopular views or for other invidious purposes, there are other safeguards that may be more appropriately invoked, including the First Amendment or equal protection concepts derived from the Fifth and Fourteenth Amendments. Cf. *Oyler* v. *Boles*, 368 U.S. 448 (1962). And,

of course, the legislative process is also available if prophylactic measures are deemed necessary or appropriate to guard against potential abuses of modern, efficient law enforcement techniques.[11]

In short, the Fourth Amendment cannot properly be invoked to condemn legitimate police investigative techniques on the ground that such techniques—although not violative of traditional Fourth Amendment norms—might be subject to abuse under some imaginable scenario. Rather, it is necessary to examine the nature of the information disclosed by the particular law enforcement practice in order to determine whether its use infringes a legitimate expectation of privacy, and, if so, to balance the gravity of that invasion against other relevant in-

---

[11] Thus, we note that following this Court's decision in *United States* v. *Miller*, 425 U.S. 435 (1976), Congress enacted the Right to Financial Privacy Act of 1978, Pub. L. No. 95-630, Tit. XI, 92 Stat. 3697 *et seq.*, in order "to protect the customers of financial institutions from unwarranted intrusion into their records while at the same time permitting legitimate law enforcement activity" (H.R. Rep. 95-1383, 95th Cong., 2d Sess. 33 (1978)). The House Report explicitly stated (*id.* at 34) that the legislation

> is a congressional response to the Supreme Court decision in * * * *United States* v. *Miller* which held that a customer of a financial institution has no standing under the Constitution to contest Government access to financial records. * * * [W]hile the Supreme Court found no constitutional right of privacy in financial records, it is clear that Congress may provide protection of individual rights beyond that afforded in the Constitution.

Similarly, following the decision in *Zurcher* v. *Stanford Daily*, 436 U.S. 547 (1978), Congress enacted the Privacy Protection Act of 1980, Pub. L. No. 96-440, 94 Stat. 1879 *et seq.*, to "afford[] the press and certain other persons not suspected of committing a crime with protections not provided currently by the Fourth Amendment" (S. Rep. 96-874, 96th Cong., 2d Sess. 4 (1980)). The Senate Report noted that the legislation was a response to the Court's statement in *Zurcher* that " 'the Fourth Amendment does not prevent or advise against legislative or executive efforts to establish nonconstitutional protections against possible abuses' " (S. Rep. 96-874, *supra*, at 5 (quoting *Zurcher*, 436 U.S. at 567)).

terests in deciding what regime of regulation is appropriate.

5. Finally, respondents contend (Karo Br. 34-40; Harley Br. 31-33) that even if their Fourth Amendment rights were not violated by the warrantless installation and monitoring of the beeper, the evidence seized at the Taos residence nevertheless should be suppressed under the Court's "supervisory powers." Specifically, respondents assert that certain misrepresentations in the affidavit supporting the issuance of the beeper warrant (see our opening brief at 4 n.3) justify suppression of the fruits of the beeper surveillance.

Respondents' contention is untenable in light of *United States* v. *Payner*, 447 U.S. 727 (1980). There, this Court expressly rejected the view "that a federal court should use its supervisory power to suppress evidence tainted by gross illegalities that did not infringe the defendant's constitutional rights" (*id.* at 733).[12] The Court explained (*id.* at 735-736 (citations and footnote omitted)):

> Our Fourth Amendment decisions have established beyond any doubt that the interest in deterring illegal searches does not justify the exclusion of tainted evidence at the instance of a party who was not the victim of the challenged practices. The values assigned to the competing interests do not change because a court has elected to analyze the question under the supervisory power instead of the Fourth Amendment. In either case, the need to deter the underlying conduct and the detrimental impact of excluding the evidence remain precisely the same.

---

[12] *Cf. Franks* v. *Delaware*, 438 U.S. 154, 171-172 (1978), where the Court held that a deliberate falsehood or reckless disregard for the truth in a warrant affidavit will not invalidate the warrant so long as the remaining portions of the affidavit are sufficient to support a finding of probable cause.

Thus, if we are correct in our contention that the effectively warrantless beeper surveillance in this case did not violate respondents' Fourth Amendment rights, it follows under *Payner* that respondents may not invoke the supervisory power "as a substitute for established Fourth Amendment doctrine" (447 U.S. at 736 n.8).[13]

---

[13] Respondents' reliance on *United States* v. *Cortina*, 630 F.2d 1207 (7th Cir. 1980), is entirely misplaced. In *Cortina*, an agent deliberately lied in an affidavit for a search warrant in order to create probable cause where none in fact existed and also lied in his testimony at the suppression hearing. Noting that "[t]here was no probable cause for the search without the facts misrepresented by [the agent]" (630 F.2d at 1208), the court of appeals held that it was proper to suppress the fruits of the agent's misconduct as to all defendants (even those who may not have had a privacy interest in the searched premises) in order to preserve the integrity of the judicial system. Here, unlike in *Cortina*, ample probable cause existed. The misstatements that were made were intended to protect the identity of a cooperating informant, not to convey an impression of the existence of probable cause where none in fact existed. Thus, whether or not the misrepresentations were justified and whether or not *Cortina* was correctly decided, defects in the warrant cannot serve as a basis for suppressing the fruits of the beeper surveillance if we are correct that no warrant was required.

More apt to this case than *Cortina* is *United States* v. *Broward*, 594 F.2d 345 (2d Cir.), cert. denied, 442 U.S. 941 (1979). There, the government presented to a magistrate an affidavit for an arrest warrant that falsely characterized an informant as a co-defendant and that contained other factual misrepresentations designed to conceal the informant's cooperation in order to assure her safety (594 F.2d at 348). One of the defendants named in the arrest warrant was arrested in front of his apartment building. When the defendant stated that he wished to inform his wife that he was under arrest, he was accompanied back to his apartment by DEA agents, who, while standing in the apartment doorway, observed marijuana, hashish and a pipe in plain view inside the apartment (*id.* at 349). The agents then obtained a warrant to search the apartment, where they seized heroin, marijuana and drug paraphernalia. In reversing the district court's order suppressing this evidence, the Second Circuit rejected the argument that the evidence was the fruit of the factual misstatements in the arrest warrant affidavit. Noting that no warrant was required to effect the defendant's arrest in a public

For the foregoing reasons, and those stated in our main brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

APRIL 1984

---

place on probable cause, the court concluded that the subsequent seizure of the evidence inside the apartment was the fruit of the lawful arrest and not of the arguably defective arrest warrant (*id.* at 350). Here too, assuming that respondents' Fourth Amendment rights were not violated by the warrantless beeper surveillance, respondents are not entitled to suppression of the fruits of that surveillance as a result of any improprieties connected with the affidavit supporting the beeper warrant. Like the defendants in *Broward*, respondents "suffered no prejudice" because "[n]o evidence was gathered that would not have been obtained absent the [ill-advised misrepresentations in the superfluous beeper warrant affidavit]" (*id.* at 351).

☆ U. S. GOVERNMENT PRINTING OFFICE: 1984 421023 829